

STATE OF CALIFORNIA
BOARD OF EQUALIZATION
BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Claim)	
for Refund Under the)	DECISION AND RECOMMENDATION
Hazardous Substances Tax Law)	
of:)	
)	
)	No.
)	
<u>Claimant</u>)	

The Appeals conference in the above-referenced matter was scheduled for _____ by Staff Counsel Janice M. Jolley, in Sacramento, California.

Appearing for Claimant: Waived

Appearing for the Dept. of
Toxic Substances Control: Waived

Appearing for the Special
Taxes Department of the
Board of Equalization: Waived

Protested Item

Claimant protests the application of a Corporation Fee (Environmental Fee) of \$500 for the period from January 1, 1990 through December 31, 1990.

Contention

Claimant contends that it does not use, generate, store or conduct activities related to hazardous materials and thus is not liable for the fee.

Summary

Claimant is a corporation which is engaged in insurance brokerage. During calendar year 1990, claimant alleges it had about 100 employees.

The Department of Toxic Substances Control (hereinafter "DTSC") takes the position that all businesses in this state use, generate, store, or conduct activities related to hazardous materials. The definition of hazardous materials is broad enough to include many materials commonly found in the workplace. These include ink, toner fluid, heavy metals on circuit boards and computers, cleaning substances, and mercury and polychlorinated biphenyls in fluorescent lights. In addition, most businesses use motor vehicles to receive or deliver goods and services. Vehicles use hazardous materials such as lead batteries, oil and fuel. DTSC has applied the fee under the provisions of Section 25205.6 of the Health and Safety Code, subdivisions (a) and (b), which imposes a fee on corporations based on the number of employees and the nature of the business of the corporation.

Claimant was classified under SIC Code 65, "Real Estate". It seems claimant would have been more properly classified under SIC Code 6411, "Insurance Agents, Brokers and Service". Claimant alleges that it does not carry on any activity which involves hazardous materials. Claimant contends it is unfair to tax only corporations and not partnerships or individuals engaged in the same business. Claimant also contends that the materials listed by DTSC are not handled by claimant in quantities which are hazardous. None of the hazardous materials are related to petitioner's business purposes.

Analysis and Conclusions

Section 25205.6 of the Health and Safety Code provides in subdivisions (a) and (b):

"(a) On or before November 1 of each year, the department shall provide the board with a schedule of two digit SIC codes, as defined in subdivision (o) of Section 25501, as established by the United States Department of Commerce, that consists of corporations which use, generate, store, or conduct activities in this state related to hazardous materials, as defined in

subdivision (j) of Section 25501 including, but not limited to, hazardous waste.

"(b) Each corporation identified in the schedule adopted pursuant to subdivision (a) shall pay an annual fee, which shall be set at one hundred dollars (\$100) for those corporations with 50 or more employees but less than 100 employees, five hundred dollars (\$500) for corporations with 100 or more, but less than 500 employees, and one thousand dollars (\$1,000) for corporations with 500 employees or more."

"(c) The fee imposed pursuant to this section shall be paid by each corporation which is identified in the schedule adopted pursuant to subdivision (a) in accordance with Part 22 (commencing with Section 43001) of Division 2 of the Revenue and Taxation Code and shall be deposited in the Hazardous Waste Control Account. The revenues shall be available, upon appropriation by the Legislature, to cover the costs of implementing this chapter.

"(d) For purposes of this section, the number of employees employed by a corporation is the number of persons employed in this state for more than 500 hours during the previous calendar year for which the fee is due.

Subdivision (o) of Section 25501 of the Health and Safety Code is now subdivision (p), and subdivision (j) of that section is now subdivision (k). (Ch. 1662, sec. 2, Stats. 1990.) Those subdivisions provide:

"(k) 'Hazardous material' means any material that, because of its quantity, concentration, or physical or chemical characteristics, poses a significant present or potential hazard to human health and safety or to the environment if released into the workplace or the environment. 'Hazardous materials' include, but are not limited to, hazardous substances, hazardous waste, and any material which a handler or the administering agency has a reasonable basis for believing that it would be

adopt a schedule of SIC codes, as defined...." (Emphasis added.)

However, AB 41 (Chapter 1032, Stats. 1989), effective September 29, 1989, amended this section to read:

"(a) On or before November 1 of each year the department shall provide the board with a schedule of two-digit SIC codes as defined...." (Emphasis added.)

Further, technical expertise resides solely within DTSC. The Board has no capability to determine the degree or nature of hazardous materials. Section 43301 of the Revenue and Taxation Code provides, in pertinent part:

"No petition for redetermination of taxes determined under this part shall be accepted or considered by the board if the petition is founded upon the grounds that the director has improperly or erroneously determined that any substance is a hazardous or extremely hazardous waste. Any appeal of a determination that a substance is a hazardous or extremely hazardous waste shall be made to the director."

While this statute relates to hazardous waste rather than hazardous materials, there is a clear analogy to hazardous materials. It is my conclusion, therefore, that any challenge to a finding by DTSC that a substance is hazardous must be through the internal review procedures of DTSC or by court action.

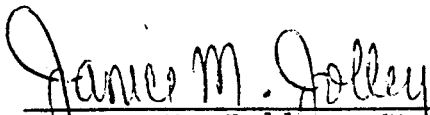
The question from a due process standpoint is whether DTSC could properly implement a determination that all SIC codes include corporations that are involved with hazardous materials without going through a formal regulation adoption process. The statute neither prohibits nor requires DTSC to adopt a regulation. The decision as to whether a regulation is required is within the purview of the Office of Administrative Law (Government Code Section 11347.5) or of the courts. An agency cannot adopt a policy which is the equivalent of a regulation without going through the formal procedure for adopting a regulation.

The only issues subject to my review are (1) is the claimant in a SIC code which is on the list furnished by DTSC to the Board; (2) is claimant a corporation; and (3) how many employees does claimant have. As to these issues, I find

claimant clearly falls within the category of corporations subject to tax in the amount of \$500 under Health and Safety Code Section 25205.6 based upon its estimate of about one hundred employees.

Recommendation

Deny the claim.


Janice M. Jolley, Staff Counsel

Date